IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 8468 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE ANIL R. DAVE
HONOURABLE MR.JUSTICE AKIL KURESHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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AKHIL GUJARAT PRAVASI VAHAN SANCHALAK MAHA MANDAL & 4 - Petitioner(s)
Versus
STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :
MR RAMKRISHNA B DAVE for Petitioner(s) : 1 - 5.
MR UR BHATT, AGP for Respondent(s) : 1 - 2.

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CORAM : HONOURABLE MR.JUSTICE ANIL R. DAVE

and

HONOURABLE MR.JUSTICE AKIL KURESHI

Date : 23/02/2007

CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. In the present petition, the petitioners have challenged the provisions of Bombay Motor Vehicles Tax (Gujarat Amendment) Act 2000 (Gujarat Act No. 11 of 2000). The petitioners have also prayed for quashing and setting aside the communication of the Regional Transport Officer rejecting certain applications of owners of Motor Vehicle of the members of the petitioner no.1-Association. Shortly stated facts leading to the petition are as follows.

2. The petitioner no.1 is a registered Association whose members are individuals and partnership firms or private limited companies who are registered owners of motor vehicles. These individual partnership firms and Companies whose interests the petitioner no.1-Association seeks to espouse in this petition are bus operators in the State of Gujarat. Rest of the petitioners are members of petitioner no.1 Association.

2.1 For making certain amendments in the Bombay Motor Vehicle Tax Act (here-in-after referred to as “the said Act”), the State legislature enacted the Amending Act namely the Bombay Motor Vehicle Tax (Gujarat Amendment) Act 2000 (Gujarat Act No. 11 of 2000). It is the case of the petitioners that the said

Act No. 11 of 2000 is ultra virus the Constitution and outside of legislative competence of the State Legislature. For the reasons stated here-in-after, it is not necessary to note at length the challenge of the petitioners to the Constitutional validity of the said Gujarat Act No. 11 of 2000.

2.2 Second limb of the grievance of the petitioners however, is that even if Gujarat Act No. 11 of 2000 is held Constitutionally valid, the respondents could not have rejected the applications of the concerned vehicle owners for grant of certificate of non user for the reason stated in such rejection orders. The petitioners have produced at Annexure-G one such order passed by the authorities to demonstrate that the authorities are applying conditions for grant of refund under section 3A(5)(b) of the said Act for deciding cases of non-user. It is the case of the petitioners that such conditions are not applicable for deciding the request of the Vehicle owners for grant of certificate of non-user.

2.3 It is not in dispute that in this petition, grievance of the petitioners regarding Certificate of non-user of Motor Vehicle particularly

designated omni buses is for the period during 1st April 2000 and 25th October, 2000.

3.The learned advocate Shri R.B. Dave for the petitioners submitted that the action of the respondents in refusing to grant non user certificate is illegal and unlawful. In this regard, he pointed out the communication dated 03-06-2004 at Annexure-G collectively. It is his case that the respondents have erroneously turned down the application for grant of non user certificate relying on the conditions laid down in section 3A(5) of the said Act which conditions are germane for grant of refund of Vehicle Tax already paid by the owner of the vehicle and not for claiming non user certificate. It is the case of the petitioners that the application for non user certificate of an owner of the vehicle would be governed by the provisions of Rule 5 of Bombay Motor Vehicles Tax Rules, 1959(here-in-after referred to as “the said Rules”).

3.1 It is also the case of the petitioners that Act No.11 of 2000 by which certain amendments were made in the said Act is ultra vires the Constitution.

3.2 The petitioners have therefore, prayed for a writ of mandamus or an appropriate writ or direction against the implementation of Act No.11 of 2000. The petitioners have also prayed for quashing and setting aside the communications of the R.T.O. by which, application by the vehicle owners for non user certificate came to be rejected by the impugned communication dated 03-06-2004.

3.3 As noted earlier, it is not in dispute that in the present petition, we are concerned with the case of non user of motor vehicles particularly, the designated omnibuses for the period during 1st April, 2000 and 25th October, 2000, during which period certain provisions were in existence in the said Act as well as in the said Rules. It would therefore, be necessary to focus our attention on the statutory position prevailing at the relevant time for deciding the legal issues arising in this petition.

3.4 In so far as the challenge of the petitioners to the Act No.11 of 2000 is concerned, the same need not detain us for long. A Division Bench of this Court by judgement dated 01-03-2006 passed in Special Civil Application No.3240/2005 and connected matters arising

in case of Morbi Passengers & Goods Transport Pvt. Ltd. v. State of Gujarat & ors. held that by virtue of the decision of the Hon'ble Supreme Court in the case of State of Gujarat & Ors. vs. Akhil Gujarat Pravasi V.S. Mahamandal & ors. reported in AIR 2004 SC 3894, there is no scope to declare the said Act No.11 of 2000 as ultra vires the Constitution. The conclusions of the Division Bench in the said case of Morbi Passengers & Goods Transport Pvt. Ltd. v. State of Gujarat & ors. (supra) may be noted at this stage.

> "10. Once the judgement dated 17th August, 2001, holding Act No.11 of 2000 in relation to amendment in Section-3A, Sub-Section-(5) *ultra vires*, was set aside by the Supreme Court, then, no part of the judgement would survive. The endeavour of the learned Counsel that the Supreme Court had set aside the judgement in relation to Act No.9 of 2002 only cannot be upheld. The Supreme Court did not say that it was modifying the judgement of the High Court or was making a little interference into it. The Supreme Court pointedly set aside the judgement dated 17th August, 2001. Once the judgement dated 17th August, 2001 was set aside, then, the observations of the High Court, holding Act No.11 of 2000 to be *ultra vires* the Constitution, also go.
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> 11. In view of the aforesaid discussion, we are unable to hold that Act No.11 of 2000 is *ultra vires* the Constitution or the State Government is not justified in making the demand or imposing penalty. The petitions are dismissed, Rule is discharged. However, there shall be no order as to costs."

4. In view of the above decision of a coordinate Bench of this Court, we need not examine the challenge of the petitioners to the validity of the said Act No.11 of 2000. In fact, learned advocate Shri R.B. Dave for the

petitioners though did not give up the challenge to the validity of the said Act, he was unable to draw any distinction which would permit this court to entertain the challenge of the petitioners to the very same Act No.11 of 2000, the validity of which has already been upheld by another Division Bench of this Court. Therefore, in so far as the prayer of the petitioners for a direction against implementation of Act No.11 of 2000 is concerned, the same must fail.

5. It is however the case of the petitioners as canvassed through their learned advocate that even in the face of the Act No.11 of 2000, being held Constitutional and valid, the respondents could not have rejected the applications of the vehicle owners for certificate of non use for the reasons stated in such rejection orders. In this regard it is contended that conditions for grant of refund under section 3A(5)(b) cannot be applied for deciding the case of non-user under Rule 5 of the said Rules.

5.1 In this regard it was submitted that the statutory position prevailing at the relevant time namely for the period between 1st April, 2000 and 25th October, 2000 shall have to be taken into account for

deciding the validity of action of the respondents. The learned advocate Shri Dave submitted that as per the provisions contained in the said Act and the said Rules, for the above mentioned period, the owner of a motor vehicle not intending to use or keep for use his vehicle and desiring to be exempted from the payment of tax on that account, could make an application to the Taxation Authority in advance, and if, the owner of the motor vehicle satisfied the Taxation Authority that the motor vehicle in question has not been used or kept for use for the period in declaration, then in such a case, the authority was required to issue a certificate of non user which would exempt the owner of the motor vehicle from payment of tax.

6. He further submitted that the provisions which were under consideration before the Hon'ble Supreme Court in the case of State of Gujarat & Ors. vs. Akhil Gujarat Pravasi V.S. Mahamandal & ors.(supra), were vitally and significantly different from the provisions contained in the said Act and the said Rules which governed the situation for the period between 1st April, 2000 and 25th October, 2000 for which the request of the vehicle owners for grant of non use certificate has been illegally rejected by the authority.

6.1 He therefore, submitted that despite the decision of the Hon'ble Supreme Court in the case of State of Gujarat & Ors. vs. Akhil Gujarat Pravasi V.S. Mahamandal & ors.(supra), in the present case, the stand of the respondents that for grant of non user certificate, the vehicle owner had to satisfy certain conditions of non use as contained in section 3A(5)(b) of the said Act, is not valid. He submitted that the said conditions are to be satisfied in a case where the owner of the motor vehicle was seeking refund of tax already paid.

7. On the other hand learned AGP Shri Uday R. Bhatt opposed the petition. He submitted that in view of the decision of the Hon'ble Supreme Court in the case of State of Gujarat & Ors. vs. Akhil Gujarat Pravasi V.S. Mahamandal & ors.(supra), by which the decision of this Court in the case of Akhil Gujarat Pravasi Vahan Sanchalak Mahamandal & ors. v. State of Gujarat & ors. reported in 2002(1) GLH 21, came to be reversed, the stand of the respondents is justified. He submitted that the respondents correctly rejected the applications of the vehicle owners for grant of non use certificate since they did not fulfill the

conditions laid down in section 3A(5) of the said Act. He further submitted that as per the provisions contained in sub-section(5) of section 3A and in particular clause(b) thereof, the authority had to be satisfied that the non use of the vehicle in question was on account of accident which is registered in the police station or of the order of the Competent Court or the Government Authority. Only for such contingencies that the non use certificate can be granted. Heavy reliance was placed on the decision of the Hon'ble Supreme Court in case of State of Gujarat & Ors. vs. Akhil Gujarat Pravasi V.S. Mahamandal & ors. (supra), wherein the Hon'ble Supreme Court was pleased to hold that the fact that the statute provides for refund of the tax, if the authority is satisfied that the vehicle has not been used, does not mean that Legislature can only make a provision for levy of tax which is limited for the period of actual use or that no tax can be levied during the period the vehicle is not put to use in the State.

8. Having heard the learned advocates appearing for the parties, it would appear that the central question that calls for consideration by this Court is whether the request of the owner of a vehicle(in the present case

a designated omnibus) for being granted non use certificate can be refused on the ground that the conditions mentioned in clause(b) of sub-section(5) of section 3A of the said Act are not fulfilled. This question needs to be decided on the basis of statutory provisions prevailing for the period between 1st April, 2000 and 25th October, 2000 since it is not in dispute that the request for grant of non use certificate was for period falling within the said two dates.

9. Section 3 of the said Act provides for levy of tax. Section 3 inter-alia provides that subject to the other provisions of the Act on and from the 1st day of April, 1958 there shall be levied and collected on all motor vehicles used or kept for use in the State, a tax at the rates fixed by the State Government, by notification in the Office Gazette, but not exceeding the maximum rates specified in the first Schedule.

9.1 For the period in question i.e. between 1st April, 2000 and 25th October, 2000, section 3A of the said Act read as follows :

“Section 3A.(1) On and from the 1st day of April, 1991, there shall be levied and collected on all omnibuses which are used or kept for use in the State exclusively as contract carriages [hereinafter in this section and

sub-section(1A) of Section 4 referred to as “the designated omnibuses”] a tax at the rate specified in the table below:-

Sr. No.	Description of Designated omnibuses	Annual rate of tax
1.	(a)Ordinary designated omnibuses permitted to be carried not more than twenty passengers	(Rs.3,000) per passenger permitted to be carried
	(b)Ordinary designated omnibuses permitted to be carried more than twenty passengers.	(Rs.4,500)per passenger permitted to be carried.
2.	(a)Luxury or tourist designated omnibuses permitted to be carried not more than twenty passengers.	(Rs.4,500) per passenger permitted to be carried.
	(b)Luxury or tourist designated omnibuses permitted to be carried more than twenty passengers	(Rs.6,000) per passenger permitted to be carried

Provided that in the case of the designated omnibuses used solely for the purpose of transporting students of educational institutions in the State in connection with any of the activities of such educational institutions a tax shall be levied and collected under sub-section(1) of section 3, and not under this sub-section.

2)(a) The tax leviable under sub-section(1) shall be paid in advance by every registered owner or any person having possession or control of the designated omnibuses either annually at the annual rate specified in the Table appearing in sub-section(1) or in monthly installments of one-twelfth of the annual rate.

(b)The annual payment of tax or the payment of monthly installment of tax shall be made within such period and in such manner as may be prescribed.

(3).....[Omitted as not relevant]
(4).....[Omitted as not relevant]

(5)(a)Where the registered owner or any person having possession or control of a designated omnibus who has paid tax under this section proves to the satisfaction of the Taxation Authority that the designated omnibus in respect of which the tax has been paid has not been

used or kept for use for a continuous period of not less than one month, he shall be entitled to the refund of an amount equal to one-twelfth of the annual rate of tax paid in respect of such omnibus for each complete month of the period for which the tax has been paid so however that, except as otherwise provided in clause(b) the total amount of a refund in a year shall not exceed-
(i) six hundred seventy-five rupees per passenger permitted to be carried, in the case of an ordinary designated omnibus permitted to be carried not more than twenty passengers.
(ii) One thousand twelve rupees per passenger permitted to be carried, in the case of an ordinary designated omnibus permitted to be carried more than twenty passengers.
(iii) One thousand one hundred twenty-five rupees per passenger permitted to be carried, in the case of a luxury or tourist designated omnibus permitted to be carried not more than twenty passengers.
(iv)One thousand five hundred rupees per passenger permitted to be carried, in the case of a luxury or tourist designated omnibus permitted to be carried more than twenty passengers.

Provided that for the purpose of determining the amount of refund under this clause, only such of the period in which a designated omnibus has not been used or kept for use shall be taken into account as comprises of complete months.

(b) Where a registered owner or a person having possession or control of a designated omnibus, who has paid tax under this section proves to the satisfaction of the State Government or such officer not below the rank of the Director of Transport, Gujarat State, as may, by notification in the Official Gazette, be authorized in this behalf by the State Government that the designated omnibus in respect of which tax has been paid has not been used or kept for use for a period exceeding one month in a year on account of an accident which is registered in the police station or of the order of the competent court or the Government authority, he shall be entitled to the refund of an amount equal to one-twelfth of the annual rate of the tad paid in respect of such omnibus for each complete month of the period of which the tax has been paid:

Provided that for the purpose of determining the amount of refund under this clause only such of the period in

which a designated omnibus has not been used or kept for use shall be taken into account as comprises of complete months."

From the perusal of clause(b) of sub-section(5) of section 3A, it can be seen that a registered owner or a person having possession or control of a designated omnibus, who has paid tax could claim refund thereof if he satisfies the State Government or such officer as may be prescribed by the State Government in this regard by notification in official gazette that the designated omnibus in respect of which tax has been paid has not been used or kept for use for a period exceeding one month in a year on account of an accident which is registered in the police station or of the order of the Competent Court or the Government Authority.

9.2 For the period in question between 1st April, 2000 and 25th October, 2000, rule-5 of the said Rules reads as follows :

"5. Certificate for non-user(1) a registered owner of, or any person who has possession or control of a motor vehicle, not intending to use or keep for use such vehicle in the state and desiring to be exempted from payment of tax on that account shall, before the expiry of the current period for which the tax on such vehicle has been paid or for which a declaration of non-use as herein provided has been made, make a declaration in form 'NT' for any specified period not exceeding beyond the financial year in which it is made, to the appropriate Taxation Authority along with the

certificate of taxation. The declaration shall be presented either in person to the appropriate Taxation Authority (and the Taxation Authority shall duly acknowledge its receipt) or sent by registered post acknowledgment due;

Provided that where a vehicle is rendered incapable or being used or kept for use on account of an accident, mechanical defect or any other sufficient cause, which make it impossible to give an advance declaration as aforesaid, then such declaration shall be given within a period of seven days from the date of occurrence of such accident, mechanical defect or such other cause, either in person or by registered post acknowledgment due;

(2) If the Taxation Authority is satisfied that the motor vehicle, in respect of which a declaration in form 'NT' has been made, has not been used, or kept for use for the whole or part of the period mentioned in the declaration and for which tax has not been paid, it shall certify that the motor vehicle has not been used or kept for use for the whole or part of such period as the case may be by making an endorsement in the certificate of taxation to that effect.

Provided that nothing contained in this sub rule shall effect the right of the Taxation Authority to recover the tax and penalty due for the period of non-use so certified if, at any time, it is found that the vehicle was actually used or kept for use in the State during such period.

(3) The declaration in Form 'NT' given under the proviso to sub-rule(1) shall be accompanied by the certificate of Taxation and documentary evidence if any, or any other proof evidencing such non-use of the vehicle and the period thereof. Where the appropriate Taxation Authority on considering the evidence adduced if any, and on making such inquiries as it deems fit, refuses to admit the declaration of non-use or to certify the period of non-use, it shall record in writing its reasons therefore and communicate to the applicant. “

From the perusal of the said rule, it can be seen that the same pertains to grant of certificate of non-

user.

10.On the basis of above statutory provisions we have to judge the validity of the contentions of petitioners that for grant of non-use certificate conditions contained in sub-clause(b) of sub-section(5) of section 3A cannot be applied. As per sub-rule(1) of rule 5 of the said Rules, a registered owner or any person who has possession or control of motor vehicle can seek exemption from payment of tax on the ground that he is not intending to use or keep for use such vehicle in the State. For the said purpose, he has to make a declaration of non-use as provided under the Rules before expiry of current period for which tax on such vehicle has been paid or for which a declaration of non-use has been made. Proviso to sub-rule(1) of Rule 5 however, permits the owner or person in possession or control of the motor vehicle to make such a declaration in case of vehicle being rendered incapable of being used or kept for use on account of an accident, mechanical defect or any other sufficient cause which makes it impossible to give an advance declaration within a period of seven days from the date of occurrence of such accident, mechanical defect or such other cause.

10.1 As per sub-rule(2) of rule 5, if the Taxation Authority is satisfied that the motor vehicle, in respect of which a declaration as aforesaid has been made, has not been used, or kept for use for the whole or part of the period under declaration and for which tax had not been paid, it shall certify that the motor vehicle has not been used for kept for use for the whole or part of such period.

10.2 Proviso to sub-rule(2) of rule 5 would permit the Taxation Authority to recover the tax and penalty due for the period of non-use so certified, if at any time, it is found that the vehicle was actually used or kept for use in the State during such period.

10.3 From the provisions contained in rule 5 of the said Rules, it emerges that ordinarily declaration for seeking certificate of non-user has to be made in advance before the expiry of current period for which the tax on such vehicle has been paid or vehicle is covered under the declaration of non-use. Exception to the said rule is that such a declaration can be made within seven days of an accident, mechanical defect or any other sufficient cause, which would make it

impossible to give an advance declaration. Upon the Taxation Authority being satisfied that the vehicle in respect of which the declaration has been so made, has not been used or kept for use for the whole or part of the period mentioned in the declaration and for which tax has not been paid, it shall certify that the motor vehicle has not been used or kept for use for the whole or part of such period.

10.4 From sub-rule(2) of rule 5, it is clear that certificate of non-use can be granted if in addition to authority being satisfied about the claim of the declarant about the non-use or having kept for use of a motor vehicle, it is also found that tax for such a vehicle has not been paid. Rule 5 of said rules prevailing during the period between 1st April, 2000 and 25th October, 2000 therefore, covered a situation whereby the authority would be dealing with the request of the registered owner or a person in possession or control of the motor vehicle for granting non-use certificate without paying tax in advance for the period for which such non-use certificate is sought for.

11.On the other hand sub-section(5) of section 3A of the

said Act deals with a situation where a registered owner or person in control or possession of the designated omnibus has paid tax under the said section, proves to the satisfaction of the Taxation Authority that the designated omnibus in question has not been used or kept for use for a particular period. In such a case, the person shall be entitled to the refund of the tax at the rate prescribed in the said sub-section.

11.1 Clause(b) of sub-section(5) of section 3A in particular provides inter-alia that such refund shall be granted provided the State Government or the authorised officer is satisfied that the designated omnibus has not been used or kept for use on account of an accident which is registered in the police station or of the order of the Competent Authority or the Government Authority.

11.2 Clause(b) of sub-section(5) of section 3A deals with a situation where a registered owner or a person in possession or control of a designated omnibus who has already paid the tax is seeking refund on the ground that the omnibus in question has not been used or kept for use for a certain period. In such a case refund can be had only if it is proved to the

satisfaction of the State Government or the authorised officer that the vehicle has not been used or kept for use on account of any one of the three reasons namely the accident which is registered in the police station or of the order of the Competent Court or the Government Authority. The conditions mentioned in clause(b) of sub-section(5) of section 3A are therefore, to be fulfilled in case where registered owner or person having possession or control of designated omnibus having already paid tax for a certain period claims refund thereof.

11.3 Clause(b) of sub-section(5) of section 3A of the said Act and Rule 5 of the said rules thus operate in entirely different fields. Rule 5 of the said Rules governs a situation where a registered owner or a person in possession or control of motor vehicle seeks non-use certificate which can be considered and granted only where tax has not been paid of-course provided such a person fulfills necessary conditions for grant of non-user as laid down under sub-rule(1) and sub-rule(2) of rule 5 of the said rules. On the other hand clause(b) of sub-section(5) of section 3A of the said Act governs a situation where a registered owner or a person in possession or control of a designated omnibus

seeks refund of tax already paid. The conditions required to be fulfilled for claiming refund as emerging from sub-clause(b) of sub-section(5) of section 3A of the said Act cannot have any application for the case where a registered owner or a person in possession or control of motor vehicle seeks non-use certificate under rule 5 of the said Rules.

12.The legislature has made different provisions in cases where a registered owner or person in possession or control of the motor vehicle desires to obtain non-use certificate for his vehicle. Ordinarily, he has to apply in advance. Only in certain situations where it is not possible to foresee the event that would render a vehicle not possible to be put to use, that the legislature permits a declaration to be made within seven days of occurrence of such event. Upon such a declaration and after the authority being satisfied that the vehicle has not been used or kept for use and for which tax has been paid, the certificate would be granted. On the other hand clause(b) of sub-section(5) of section 3A of the said Act governs the situation where a registered owner or a person in control of the designated omnibus has already paid the tax and thereafter, satisfies the Competent Authority that the

designated omnibus in question has not been used or kept for use for the period in question on account of three reasons mentioned therein in which case the refund can be granted by the authority at the rate prescribed therein. We see no warrant to import the conditions laid down in clause(b) of sub-section(5) of section 3A of the said Act for claiming refund of tax already paid into the provisions of rule 5 of the said Rules for grant of certificate of non-use.

13.The learned advocate Shri R.B. Dave pointed out that relevant provisions of the said Act and the said Rules were materially different in the case before the Hon'ble Supreme Court in the said decision of State of Gujarat & Ors. vs. Akhil Gujarat Pravasi V.S. Mahamandal & ors.(supra). Section 3A of the said Act and Rule 5 of the said rules which came up for consideration before the Hon'ble Supreme Court in the case of State of Gujarat & Ors. vs. Akhil Gujarat Pravasi V.S. Mahamandal & ors.(supra), read as follows :

"Section 3A.(1) On and from the 1st day of April, 1991, there shall be levied and collected on all omnibuses which are used or kept for use in the State exclusively as contract carriages [hereinafter in this section and sub-section(1A) of Section 4 referred to as "the designated omnibuses"] a tax at the rate specified in the table below:-

Sr. No.	Description of Designated omnibuses	Annual rate of tax
1.	(a)Ordinary designated omnibuses permitted to be carried not more than twenty passengers	(Rs.2,700) per passenger permitted to be carried
	(b)Ordinary designated omnibuses permitted to be carried more than twenty passengers.	(Rs.4,050)per passenger permitted to be carried.
2.	(a)Luxury or tourist designated omnibuses permitted to be carried not more than twenty passengers.	(Rs.4,050) per passenger permitted to be carried.
	(b)Luxury or tourist designated omnibuses permitted to be carried more than twenty passengers	(Rs.6,000) per passenger permitted to be carried

Provided that in the case of the designated omnibuses used solely for the purpose of transporting students of educational institutions in the State in connection with any of the activities of such educational institutions a tax shall be levied and collected under sub-section(1) of section 3, and not under this sub-section.

2)(a) The tax leviable under sub-section(1) shall be paid in advance by every registered owner or any person having possession or control of the designated omnibuses either annually at the annual rate specified in the Table appearing in sub-section(1) or in monthly installments of one-twelfth of the annual rate.
(b)The annual payment of tax or the payment of monthly installment of tax shall be made within such period and in such manner as may be prescribed.

(3).....[Omitted as not relevant]
(4).....[Omitted as not relevant]

(5)(a)Where the registered owner or any person having possession or control of a designated omnibus who has paid tax under this section proves to the satisfaction of the Taxation Authority that the designated omnibus in respect of which the tax has been paid has not been used or kept for use for a continuous period of not less than one month, he shall be entitled to the refund of an amount equal to one-twelfth of the annual rate of tax paid in respect of such omnibus for each complete

month of the period for which the tax has been paid so however that, except as otherwise provided in clause(b) the total amount of a refund in a year shall not exceed-
(i) six hundred seventy-five rupees per passenger permitted to be carried, in the case of an ordinary designated omnibus permitted to be carried not more than twenty passengers.
(ii) One thousand twelve rupees per passenger permitted to be carried, in the case of an ordinary designated omnibus permitted to be carried more than twenty passengers.
(iii) One thousand one hundred twenty-five rupees per passenger permitted to be carried, in the case of a luxury or tourist designated omnibus permitted to be carried not more than twenty passengers.
(iv)One thousand five hundred rupees per passenger permitted to be carried, in the case of a luxury or tourist designated omnibus permitted to be carried more than twenty passengers.

Provided that for the purpose of determining the amount of refund under this clause, only such of the period in which a designated omnibus has not been used or kept for use shall be taken into account as comprises of complete months.

(b) Where a registered owner or a person having possession or control of a designated omnibus, who has paid tax under this section proves to the satisfaction of the State Government or such officer not below the rank of the Director of Transport, Gujarat State, as may, by notification in the Official Gazette, be authorized in this behalf by the State Government that the designated omnibus in respect of which tax has been paid, has not been used or kept for use for a continuous period of not less than one month but exceeding three months in a year , he shall be entitled to the refund of an amount equal to one-twelfth of the annual rate of the tax paid in respect of such omnibus for each complete month of the period of which the tax has been paid:

Provided that for the purpose of determining the amount of refund under this clause only such of the period in which a designated omnibus has not been used or kept for use shall be taken into account as comprises of complete months.

Rule-5

(1) A registered owner, or any person who has possession or control of a motor vehicle in respect of which tax is paid in advance, not intending to use or keep for use such vehicle in the State and desiring to claim refund of tax on that account shall before the commencement of the period for which the refund of tax is to be claimed, make a declaration in form 'NT' for any specified period not exceeding beyond the period for which the tax is paid in advance to the Taxation Authority in whose jurisdiction such vehicle is to be kept under non-use along with the certificate of taxation as well as certificate of fitness in case of transport vehicles and a fee of rupees ten.

Provided that where a vehicle is rendered incapable or being used or kept for use on account of an accident, mechanical defect or any other sufficient cause, which make it impossible to give an advance declaration as aforesaid then such declaration shall be given within a period of seven days from the date of occurrence of such accident, mechanical defect or such other cause, either in person or by registered post acknowledgment due;

(2) If the Taxation Authority is satisfied that the motor vehicle, in respect of which a declaration in form 'NT' has been made, has not been used, or kept for use for the whole or part of the period mentioned in the declaration and it shall certify that the motor vehicle has not been used or kept for use for the whole or part of such period as the case may be by making an endorsement in the certificate of taxation to that effect.

Provided that nothing contained in this sub rule shall effect the right of the Taxation Authority to recover the tax and penalty due for the period of non-use so certified if, at any time, it is found that the vehicle was actually used or kept for use in the State during such period.

(3) The declaration in Form 'NT' given under the proviso to sub-rule(1) shall be accompanied by the certificate of Taxation and documentary evidence if any, or any other proof evidencing such non-use of the vehicle and the period thereof. Where the appropriate Taxation Authority on considering the evidence adduced if any, and on making such inquiries as it deems fit, refused to admit the declaration of non-use or to certify the period of non-use, it shall record in

writing its reasons therefor and communicate to the applicant.“

14.Clause(b) of sub-section(5) of section 3A of the said Act in its changed form has deleted the requirement of fulfillment of the conditions due to which vehicle was not used or kept for use which were required to be otherwise fulfilled as per provisions contained in clause(b) of sub-section(5) of section 3A of the Said Act as prevailing during the period between 1st April, 2000 and 25th October, 2000. Therefore, as per the amended provision, a registered owner or a person in possession or control of designated omnibus could upon satisfying the State Government or the authorised officer that the designated omnibus in question has not been used or kept for use for a certain period in the year can claim refund at the rate specified therein without further having to establish that non-use was on account of any of the three reasons mentioned above.

15.Similarly Rule 5 of the said Rules has also materially undergone changes. Sub-rule (1) of rule 5 in its changed state, provides inter-alia that a registered owner or any person in possession or control of a motor vehicle in respect of which tax has been paid in advance and who does not intend to use or keep for use

such vehicle, but desires to claim refund of tax on that account, can make a declaration in the prescribed form before the commencement of period for which refund of tax is to be so claimed. Proviso to sub-rule(1) of rule 5 however, permits such a person to make a declaration within seven days of an accident, mechanical defect or any other sufficient cause which makes it impossible to give an advance declaration as required.

15.1 As per sub-rule(2) of rule 5 of the said rules in the amended state, upon the Taxation Authority being satisfied that the vehicle in question has not been used or kept for use for whole or part of the period under declaration, he shall make an endorsement in the certificate of taxation to that effect.

16.It can thus be seen that provisions contained in section 3 of the said Act and rule 5 of the said rules have undergone material changes after 25th October, 2000. Significantly, after 25th October,2000 rule 5 of the said rules requires that in all cases, tax must be paid in advance and only upon payment of tax, a refund can be claimed upon fulfillment of the conditions set out therein. Rule 5 after its amendment is in contrast

to the provisions contained in its earlier form as applicable for the period between 1st April, 2000 and and 25th October,2000 wherein a certificate of non-use could be claimed without payment of tax and if such a certificate was granted by the Taxation Authority, owner or a person in possession or control of the motor vehicle was exempted from payment of tax. After the amendment, Rule 5 of the said Rules however, requires that the registered owner or a person in possession or control of motor vehicle must first pay the tax and, thereafter, seek a declaration for the purpose of claiming refund for motor vehicle not used or kept for use in the State.

“The language used in Section-3A all omnibuses which are used or kept for use in the State exclusively as contract carriages-is in conformity with Entry 57 of List II. The consistent view taken by this Court is that if a vehicle is “used” or is “kept for use” in the State, it becomes liable for payment of tax and the actual use or quantum of use is not material. The fact that he statute provides for refund of the tax, if the authority is satisfied that the vehicle has not been used, does not mean that the legislature can only make a provision for levy of tax which is limited for the period of actual use or that no tax can believed during the period the vehicle is not put to use in the State. The provision for the refund has been made only for the advantage of the operator so that he may be relieved of the burden of tax when he is not getting any income from the vehicle on account of its non-use but it has no relevant to the competence or authority of the State to enact a law providing for imposition of a tax on vehicles which are used or are kept for use in the State. “

17.We therefore, find considerable force in the contention raised by the learned advocate Shri R.B. Dave for the petitioners that the statutory provisions which were under consideration before the Hon'ble Supreme Court in the case of State of Gujarat & Ors. vs. Akhil Gujarat Pravasi V.S. Mahamandal & ors.(supra) were materially different as compared to the present case. In that background one has to appreciate the observations made by the Hon'ble Supreme Court in para.18 of the said decision which read as follows.

18.In the present case, we are not concerned with the competence of the State to make provisions for levy of tax for the period during which though the motor vehicle may not have been put to actual use but was kept for use in the State. In the present case we are concerned with claim of the owners of the motor vehicles seeking non-use certificate. We find that such declarations were required to be considered on the basis of rule 5 of the said Rules as prevailing at the relevant time between 1st April, 2000 and 25th October, 2000. We also find that provisions contained in clause(b) of sub-section(5) of section 3A of the said Act applied in a situation where the owner or person in possession or control of designated omnibus sought

refund of tax already paid. The provisions contained therein and in particular the conditions required to be fulfilled for refund of tax, cannot be imported in rule 5 of the said rule. To put it differently while considering the applications of the owners of the motor vehicles for grant of non-use certificate, authority could not have insisted upon the fulfillment of the conditions laid down in sub-clause(b) of sub-section(5) of section 3A of the said Act which governed the application for refund of tax.

19.In the result, petition is allowed in part. Though the challenge of the petitioner to (Gujarat Amendment) Act of 2000 is turned down, contention of the petitioners that the authorities have illegally insisted upon the fulfillment of the conditions laid down in Section 3A(5)(b) of the said Act is upheld. Consequently, order at Annexure-G is quashed. It is directed that the respondents shall process the application for grant of Certificate of non user for the period between 1st April 2000 and 25th October, 2000 without reference to such conditions.

20.With these directions, the petition is allowed to the above extent and disposed of accordingly. Rule made

absolute accordingly with no order as to costs.

(Anil R. Dave,J.)

(Akil Kureshi, J.)

(raghu)